

Council Policy Statement

Category:

Specific Subject: Litigation Holds

PURPOSE:

To ensure that the city fulfills its duty to preserve evidence whenever litigation is reasonably anticipated, threatened or pending against the city.

BACKGROUND:

When a civil lawsuit is filed, the parties engage in a pre-trial process called "discovery" whereby each party to the lawsuit may request records, documents and other tangible evidence (collectively "evidence") from the other parties to the lawsuit. Potential relevant evidence as well as any evidence that may be reasonably calculated to lead to admissible evidence at trial may be subject to a discovery request. Recent rule changes and case decisions have codified a party's duty to preserve evidence. This duty arises at the point in time when litigation is reasonably anticipated, whether the organization is the initiator or the target of litigation. The duty arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.

Whenever litigation is reasonably anticipated, threatened, or pending against the city, CMWD, or any other city entity, city official, or city employee, the city must take reasonable and good faith steps to preserve potentially relevant and discoverable information and tangible evidence. The duty to preserve (and ultimately, to produce) evidence requires a party to identify, locate, and maintain information, including electronically stored information ("ESI") and tangible evidence that is relevant to specific and identifiable litigation.

Discoverable evidence may include paper documents from file folders and file cabinets, tangible evidence (such as a stop sign or piece of corroded pipe), or ESI. ESI is essentially any electronic information that could serve as evidence in civil litigation. Example of current ESI devices: local hard drives, network hard drives, portable hard drives, "cloud" storage, e-mail, shared storage, backup systems, mobile devices (e.g. smartphones, tablets, etc.) and removable media (e.g. CDs, DVDs, flash drives, etc.). This list may expand as new storage devices are invented.

POLICY:

1. When civil litigation is reasonably anticipated the city must suspend its routine document retention/destruction policy and preserve its historical and prospective ESI, paper and other tangible records from destruction (collectively "discoverable evidence").
2. If litigation is commenced against the city and/or its employees, the city will need to (1) identify and provide a description by category and location of all discoverable evidence in its control

(including any vendors or consultants) which may be relevant to the case; and (2) produce and transfer reasonably accessible discoverable evidence in original/native format to a central repository for review and analysis. Discoverable evidence that is privileged or not reasonably accessible must be documented.

3. The City Attorney is responsible for determining when a legal hold should commence or be revoked and for directing the legal process to fulfill the discovery requirements.
4. The legal hold process will be managed by the City Attorney, City Manager, City Clerk, and Information Technology Director (collectively "Executive Team"). The Executive Team will be assisted by the department(s) responsible for record retention and production, as well as personnel associated with the subject matter of the litigation.
5. The City Manager will issue an Administrative Order which outlines the specific procedures associated with a litigation hold and which is consistent with this City Council Policy.